FILED
SEP 3 1998
OFFICE OF THE CLERK
SUPREME COURT

No. 97-1994

In the Supreme Court of the United States

OCTOBER TERM, 1997

FRANK D. NEWTON AND MARILYN NEWTON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

SETH WAXMAN
Solicitor General
Counsel of Record
LORETTA C. ARGRETT
Assistant Attorney General
TERESA E. MCLAUGHLIN
JANET A. BRADLEY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

11pp

QUESTION PRESENTED

Whether a taxpayer's suit under 28 U.S.C. 2410 to quiet title to personal property seized by the Internal Revenue Service for the collection of taxes becomes moot when that property is sold by the government to a third party before the summons is served and before a notice of lis pendens is filed.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Anderson v. *Zenali*, 78 A.F.T.R.2d (RIA) (C.D. Cal. 1996), aff'd, 129 F.3d 124 (9th Cir. 1997)	8
Bank of Hemet v. *United States*, 643 F.2d 661 (9th Cir. 1981)	6, 7
Delta Sav. & Loan Ass'n, Inc. v. *IRS*, 847 F.2d 248 (5th Cir. 1988)	5
Farr v. *United States*, 990 F.2d 451 (9th Cir.), cert. denied, 510 U.S. 1023 (1993)	4
Goodwin v. *United States*, 935 F.2d 1061 (9th Cir. 1991)	5, 7
Hughes v. *United States*, 953 F.2d 531 (9th Cir. 1992)	4
Kulawy v. *United States*, 917 F.2d 729 (2d Cir. 1990)	5, 7
Margiotta v. *District Director of Internal Revenue*, 214 F.2d 518 (2d Cir. 1954)	8
Trustees of the Puritan Church v. *United States*, 294 F.2d 734 (D.C. Cir. 19610	5

Statutes and rule:

26 U.S.C. 6335	2
26 U.S.C. 6338(a)	5
26 U.S.C. 6339(a)	5
26 U.S.C. 6339(b)(2)	8
26 U.S.C. 6342(a)	5
26 U.S.C. 6324(b)	5

Statutes and rule—Continued: Page

28 U.S.C. 1346(a)(1) 5
28 U.S.C. 2410 ..... 2, 5, 6
28 U.S.C. 2410(a)(1) 2, 3, 4
Alaska Stat. 09.45.940 (Michie 1996) 3
Fed. R. Civ. P. 4(i) 2

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1994

FRANK D. NEWTON AND MARILYN NEWTON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is unpublished, but the decision is noted at 131 F.3d 147 (Table). The opinion of the district court (Pet. App. B1-B3) is unofficially reported at 79 A.F.T.R.2d (RIA) 97-2333.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1997 (Pet. App. A1). The petition for rehearing was denied on March 16, 1998 (*id.* at C1). The petition for a writ of certiorari was filed on June 10, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Internal Revenue Service made assessments of federal income tax liabilities against petitioners for the years 1981, 1988, 1991, 1992 and 1993. After filing notices of federal tax lien, the Service seized personal property (fishing quota certificates) belonging to Mr. Newton to satisfy the unpaid tax liability. The property was seized on July 23, 1996. A public sale was scheduled to take place on August 15, 1996 (Pet. App. A3).

On August 13, 1996, petitioners filed this action in federal district court to quiet title to the fishing quota certificates. They contended that the government's seizure was improper because the Service had not complied with the provisions of 26 U.S.C. 6335 concerning notice of the seizure and sale (Doc. 1 at 4). They asserted that jurisdiction exists in this case under 28 U.S.C. 2410. That statute creates jurisdiction over a suit "to quiet title to * * * real or personal property on which the United States has or claims a mortgage or other lien." 28 U.S.C. 2410(a)(1).

Petitioners failed to issue a summons to either the United States Attorney or the Attorney General, and made no return of service pursuant to Fed. R. Civ. P. 4(i), until October 25, 1996 (Pet. App. A3). Petitioners assert that they mailed a copy of the complaint to an unspecified office of the Internal Revenue Service on the day the complaint was filed and that an undated return receipt was received by them on August 16, 1996 (*id.* at A4). On August 15, 1996, however, two days after the complaint was filed and before service was made on the United States, the fishing quota certificates were sold at the scheduled sale (*id.* at A3).

2. After receiving the summons and complaint, the United States moved for summary judgment. The government pointed out that petitioners had not sought a preliminary injunction or temporary restraining order to bar the sale and that the summons and complaint had not been served until after the sale occurred. The government further noted that the sale had been completed before notice of the suit was received by the officials responsible for conducting the sale (Doc. 12 at 5). Because the property had been sold before the complaint was served and before an injunction or notice of lis pendens was filed, the government contended that it lacked "a mortgage or other lien" interest in the property (28 U.S.C. 2410(a)(1)) as is required for quiet title jurisdiction to exist.

The district court granted the government's motion for summary judgment. The court explained that, when service is made after the property is sold, the courts have no jurisdiction under 28 U.S.C. 2410(a)(1) unless an injunction or notice of lis pendens was entered prior to the sale to prevent the "purchaser at the sale from being a bona fide purchaser for value" (Pet. App. B2).[1] The court explained that the decisions cited by petitioners involved injunctions or notices of lis pendens and were therefore "inapposite" (*ibid.*) to the case at hand. The court concluded that "[t]he United States has not

---

[1] Because this case involves personal property, taxpayers did not file, and indeed could not have filed, a notice of lis pendens under applicable state law. See Alaska Statutes 09.45.940 (Michie 1996) (providing for lis pendens only in actions affecting title or right of possession of real property).

waived its sovereign immunity in an action such as this" (*ibid.*).[2]

3. The court of appeals affirmed (Pet. App. A1-A4). The court stated that "[t]he government's sale of the property after filing of the suit * * * does not extinguish its waiver of sovereign immunity if the government has been given notice of the suit, and does not moot the action if a judgment in favor of the plaintiff still is enforceable against subsequent purchasers" (Pet. App. A3 (citations omitted)). The court concluded, however, that the present action is "moot because [petitioners'] inability to file a lis pendens against their personal property makes any judgment in their favor unenforceable against subsequent purchasers" (*id.* at A4).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Under 28 U.S.C. 2410(a)(1), "the United States may be named a party in any civil action or suit in any district court * * * to quiet title to * * * real or personal property on which the United States has or claims a mortgage or other lien." This statute is manifestly narrow in scope. The statute does not waive the government's immunity when the United States has or claims no interest in the property. The statute is also inapplicable if the government claims a title interest—rather than a mortgage or lien interest—in

---

[2] In light of its disposition of the case, the court denied as moot (Pet. App. B3) petitioners' motion (Doc. 13) to join the purchaser as a party.

the property. *Farr* v. *United States*, 990 F.2d 451, 453 (9th Cir.), cert. denied, 510 U.S. 1023 (1993); *Hughes* v. *United States*, 953 F.2d 531, 538 (9th Cir. 1992). In the present case, the government seized and sold the personal property before the summons was served. At the time that this sale occurred, title to the property passed to the purchaser (26 U.S.C. 6338(a), 6339(a)); the United States thereafter possessed no interest in the transferred property. Instead, the government held the money proceeds of the sale, in which it claimed a title interest. 26 U.S.C. 6342(a). If those sale proceeds yielded an overpayment of the outstanding tax liability, the government is to credit or refund the excess to the taxpayer. 26 U.S.C. 6342(b). If such an overpayment existed and the government failed to refund or credit the excess, the taxpayer may pursue a timely refund suit under 28 U.S.C. 1346(a)(1). As the court explained in *Trustees of the Puritan Church* v. *United States*, 294 F.2d 734, 735 (D.C. Cir. 1961), however, the provisions of 28 U.S.C. 2410 are not applicable in that context, for that statute does not apply to actions in which a plaintiff seeks to recover property that the government has seized and already sold.

If a complaint was served on the government *before* the property was sold and an injunction or a notice of lis pendens was filed with respect to the property before it was transferred to a third party, however, courts have interpreted 28 U.S.C. 2410 to allow the quiet title action to proceed even after the property is sold. See *Goodwin* v. *United States*, 935 F.2d 1061, 1063 (9th Cir. 1991) (the government had been served with the complaint and had opposed the taxpayer's request for injunctive relief prior to the sale); *Kulawy* v. *United States*, 917 F.2d 729, 731 (2d Cir. 1990) (same); *Delta Sav. & Loan Ass'n, Inc.* v. *IRS*, 847 F.2d 248, 249 n.1

(5th Cir. 1988) (lis pendens filed prior to the sale); *Bank of Hemet* v. *United States*, 643 F.2d 661, 665 (9th Cir. 1981) (lis pendens filed prior to the sale and the government had refused service of the complaint).

The present case does not fall within those limited circumstances in which courts have recognized a continuing quiet title jurisdiction after a sale. The complaint in this case was served after the sale occurred. An injunction was neither sought nor obtained, and a notice of lis pendens was not filed prior to the date of the sale.[3] Petitioners thus failed to take effective steps to preserve the status quo. In these circumstances, the court of appeals properly concluded that a quiet title action could not proceed under 28 U.S.C. 2410 because any judgment in petitioners' favor would be "unenforceable against subsequent purchasers" of personal property at the sale (Pet. App. A4).

2. The courts below correctly held (Pet. App. A4, B2) that the decisions on which petitioners seek to rely are inapposite to the present case.

a. The court of appeals correctly distinguished its prior decision in *Bank of Hemet* v. *United States*, 643 F.2d 661 (1981). That case held only that the sale of the property after the filing of the suit "does not extinguish [the government's] waiver of sovereign immunity *if the government has been given notice* of the suit" (Pet. App. A3) (emphasis added). In *Bank of Hemet*, unlike the present case, a notice of lis pendens had been recorded that informed both the government and the purchaser of the existing title dispute. Moreover, in *Bank of Hemet*, the failure to effect service on the

---

[3] Petitioners included a request for injunctive relief in their complaint, but they did not move for a preliminary injunction or a temporary restraining order prior to the sale.

United States prior to the sale was due to the delay of the United States Marshal, and the Treasury officials who conducted the sale had refused service of the complaint. 643 F.2d at 665.

b. Petitioners incorrectly assert (Pet. 11) that the existence of notice to the United States of the quiet title suit is irrelevant. In each of the appellate decisions that have held that quiet title jurisdiction existed after the property had been sold, the government received formal notice of the taxpayer's lawsuit prior to the sale of the property. *See, e.g., Goodwin* v. *United States*, 935 F.2d at 1063; *Kulawy* v. *United States*, 917 F.2d at 731; *Delta Sav. & Loan Ass'n, Inc.* v. *IRS*, 847 F.2d at 249 n.1; *Bank of Hemet* v. *United States*, 643 F.2d at 665.

Petitioner errs in contending (Pet. 8-9, 11-14) that the decision in this case conflicts with *Goodwin* v. *United States*, *supra*, and *Kulawy* v. *United States*, *supra*. In *Goodwin*, a notice of lis pendens had been recorded before the sale occurred. 935 F.2d at 1063. And, in *Kulawy*, unlike the present case, the government had been served with the complaint prior to the sale and the taxpayer had "promptly moved for a preliminary injunction against the sale." 917 F.2d at 731. The facts of those cases differ markedly from the present case.

Petitioners nonetheless assert (Pet. App. 14-16) that, even after the property has been bought by an innocent third-party purchaser, a quiet title suit could be allowed to proceed on the theory that the original sale was "void" rather than merely voidable. As the court of appeals concluded in this case (Pet. App. A4), however, the sale of property to a third party who has no notice of the quiet title dispute *is* effective to transfer title and

is not void. There is no conflict among the circuits to warrant review of that decision in this case. [4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH WAXMAN
Solicitor General
LORETTA C. ARGRETT
Assistant Attorney General
TERESA E. MCLAUGHLIN
JANET A. BRADLEY
Attorneys

SEPTEMBER 1998

---

[4] Petitioners incorrectly rely (Pet. 17) on *Anderson v. Zenali*, 78 A.F.T.R.2d (RIA) 96-5838 (C.D. Cal. 1996), aff'd, 129 F.3d 124 (9th Cir. 1997) (Table). The court in *Zenali* emphasized that that quiet title suit involved real property and was commenced against the purchaser *before* the deed was recorded. 78 A.F.T.R.2d at 96-5840, 96-5842. It is the deed that conveys and transfers title to real property under 26 U.S.C. 6339(b)(2).

Taxpayers also err in relying (Pet. 18) on *Margiotta* v. *District Director of Internal Revenue*, 214 F.2d 518 (2d Cir. 1954). That case did not involve the quiet title jurisdiction of 28 U.S.C. 2410. Instead, it was a bankruptcy case in which the party who held the property by assignment from the purchaser "interposed no objection to the summary jurisdiction" and was therefore "deemed to have consented to such jurisdiction" under the relevant provisions of Title 11. 214 F.2d at 520.